

MUCHIRI (Migration) [2018] AATA 4705 (11 October 2018)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss MARY MUTHONI MUCHIRI
CASE NUMBER:	1730500
DIBP REFERENCE(S):	BCC2017/2968553
MEMBER:	Mara Moustafine
DATE:	11 October 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 11 October 2018 at 3:46pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus documentation – counterfeit academic documents – no public interest waiver claims – decision under review remitted for reconsideration

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65, 359AA
Migration Regulations 1994 (Cth), Schedule 2 cl 500.217 Schedule 4 PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 November 2017 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 18 August 2017. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.217(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because he found that the applicant did not meet Public Interest Criterion 4020 (PIC 4020).
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.500.217(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
8. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Evidence before the Department

9. According to the delegate's decision record, a copy of which was submitted to the Tribunal with the review application, the applicant provided, or caused to have provided, a bogus document or false or misleading information as evidence of her academic qualifications in the context of her current and previous Student visa applications.
10. In particular, in support of her offshore visa application for a TU 572 Student visa on 4 May 2015, the applicant submitted: a Certificate in Food Production dated 24/09/2012 and a Final Report of the course "Certificate in Food Production" dated 17/11/2012, both issued by

Kenya Utalii College, Nairobi. The same Final Report of the course "Certificate in Food Production" dated 17/11/2012 issued by Kenya Utalii College, Nairobi was submitted in relation to her application for a TU-500 Student visa on 18 August 2017.

11. When the Department sought to verify the above mentioned documents, it received information from reliable sources that these documents were not issued by the education provider Kenya Utalii College, Nairobi and were "Counterfeit".
12. On 10 October 2017, the department wrote to the applicant through her migration agent, inviting her to comment on the suspected 'non-genuine' information supplied to the department and to advise if she believed there were any compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, to justify the waiver of any or all of PIC 4020(1) and (2) to justify the granting of the visa.
13. On 6 November 2017 the applicant's migration agent submitted a hand written 'quick note' from the client requesting additional time to submit a reply, in which she stated as follows:
 14. *I state that the documents are not fraudulent and due to the just concluded elections, things have not gone back to normal and I am requesting you to give me more time so that I can provide you with evidence.*
 15. *The certificate is not fraudulent and the college issued me with the certificate having different dates because I got my certificate and the transcript on different dates so that is why they have different dated which is a typing error on the dates.*
16. On 14 November 2017 the applicant submitted a new "Certificate in Food Production" dated 22 September 2012 which was entirely different from the original certificate submitted with the applicant's offshore student visa application for TU-572 visa. The applicant also attached a letter from Kenya Utalii College dated 8 November 2017 confirming that the applicant had studied in their institution for the Certificate in Food Production course and that the certificate issued had some anomalies which had since been rectified.
17. In his decision of 10 October 2018, the delegate found that the applicant had given a bogus document within the meaning of section 5(1) of the Migration Act. He noted that she had submitted a new "Certificate in Food Production" which was entirely different from the original certificate submitted with her offshore TU-572 student visa application and was satisfied that she had submitted documents in support of her offshore student visa application, as well as her current student visa application, which were verified to be counterfeit. He also noted that no information was submitted to indicate that the applicant was seeking a waiver of PIC 4020. The delegate concluded that the applicant did not meet PIC 4020 (1) and accordingly, did not meet Regulation 500.217.
18. **Application for Review**
19. The applicant applied to the Tribunal for a review of the delegate's decision, providing a copy of the decision for the purposes of the review. She is, therefore, taken to be on notice of the delegate's findings and reasons. The applicant was represented in relation to the review by her registered migration agent.
20. Ahead of the hearing the applicant submitted to the Tribunal a statement dated 8 October 2018 outlining her education and work background offshore and her study history in Australia, as well as a letter from the Sydney Business and Tourism Academy stating that she was enrolled in Advanced Diploma of Travel and Tourism Management (5 February to 7 December 2018) and an interim Record of Results.
21. The applicant appeared before the Tribunal on 11 October 2018 to give evidence and present arguments.

22. At the hearing, the Tribunal discussed with the applicant the sequence of events outlined in paragraphs 6-12 above. The applicant accepted that the above chronology was a fair representation of what transpired during the Department's processing of her application.
23. The applicant claimed that the documents from Kenya Utalii College which she had submitted with her original visa application had been given to her by her lecturer after she finished the course. After she was informed by the Department that the documents were counterfeit, she went back to check the documents and found that the dates of the certificate and academic transcript were different. The applicant then contacted her lecturer, who rectified the issue and sent her a new certificate which she had provided to the Department.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

24. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
25. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
26. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
27. In discussion at hearing the applicant said she had assumed that the problem the documents she had submitted from Kenya Utalii College were that the dates on the certificate and report were not aligned. The Tribunal showed the applicant copies of the documents from Kenya Utalii College that she had originally submitted: a Certificate in Food Production dated 24 September 2012 and a Final Report of the course dated 17 November 2012; as well as the new certificate dated 22 September 2012 and asked her how the new certificate rectified the problem. The applicant then pointed out that the last sentence of the new certificate referred to the award of a "Certificate", while the earlier one had referred to a "Diploma" and said she had forgotten that it was this, rather than the dates, that she had assumed were the problem.
28. The Tribunal pointed out that, as noted in the delegate's decision, the reason the documents had been identified as "counterfeit" was that, when the Department verified them, they were advised that they had not been issued by Kenya Utalii College. In accordance with s.359AA of the Act, the Tribunal drew to the applicant's attention a letter on the Department file from Kenya Utalii College dated 9 June 2016, which identified the documents she had originally submitted and confirmed that they were "not issued" by the college. Further, the Tribunal pointed out to the applicant that the letterhead and college identifiers of this letter were quite different from those in the letter from the college which she had submitted with the new certificate. The Tribunal noted that this raised doubts about the veracity of all the documents from the college which the applicant had submitted in relation to her visa application and called into question her truthfulness and the general credibility of her evidence. The applicant responded that she had received the letter after speaking with her teacher, though

she did not remember his name. The Tribunal's concerns are not assuaged by this response.

29. On the basis of the evidence before it, the Tribunal finds that there is evidence before it that the applicant has given or caused to be given to the Department in relation to her student visa application a 'bogus document', as defined in s.5(1), ie a document that the Tribunal reasonably suspects purports to have been, but was not, issued in respect of the person.
30. Therefore, the applicant does not meet cl.4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

31. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
32. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
33. After explaining the waiver provisions to the applicant at the hearing the Tribunal asked her whether she wished to put forward any submissions regarding the waiver provisions. After discussing whether it was relevant that she was due to complete her course in December 2018, the applicant responded that she did not have any claims for a waiver.
34. Based on the evidence before it the Tribunal is not satisfied that the applicant's circumstances constitute compelling circumstances that affect the interests of Australia, or that there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen, to justify the granting of the visa. Accordingly, the Tribunal is not satisfied that the requirements of PIC 4020(1) should be waived.
35. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.500.217(1).
36. There is nothing in the information before to the Tribunal to indicate that the applicant is eligible to be granted a student visa of another subclass.

DECISION

37. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.
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Mara Moustafine
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

- (1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or

- (c) was obtained because of a false or misleading statement, whether or not made knowingly.